

ORIGINAL
FILE

RECEIVED

NOV - 9 1992

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of

Amendment of the Commission's Rules
to Establish New Personal Communications
Services

)
)
) GEN Docket No. 90-314
) ET Docket No. 92-100
)

COMMENTS

Gateway Technology, Inc. ("Gateway"), by its attorneys and pursuant to Section 1.415 of the Commission's Rules, hereby submits its initial comments in response to the Commission's *Notice of Proposed Rule Making and Tentative Decision* (the "*Notice*") in this proceeding.¹ For the reasons set forth below, Gateway urges the Commission in awarding Personal Communications Services ("PCS") authorizations to utilize a reformed lottery process featuring heightened eligibility requirements² and to award a 2:1 "experimenter's preference" in PCS lotteries to those who have conducted meaningful PCS experimentation.

¹*Amendment of the Commission's Rules to Establish New Personal Communications Services*, 7 FCC Rcd 5676 (1992)[hereinafter cited as "*Notice*"].

²The Commission's experience regarding the licensing of nationwide 220-222 MHz systems is proof positive that the Commission can combine high filing fees, strict entry criteria, financial requirements, construction deadlines and restrictions on license assignments to minimize speculative applications and assure the licensing of qualified entities. See *Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Services*, 7 FCC Rcd 4484 (1992). By crafting a regulatory framework for the licensing of PCS that is not conducive to speculative applications, the Commission can retain all of the benefits of a lottery system, without either the administrative burdens associated with speculative applications or the problems identified with auctions.

No. of Copies rec'd
LSIABODE

0411

Gateway is a start-up corporation formed to develop new communications services and offer those services to the public. In furtherance of its objectives, Gateway has recently become the licensee of Experimental Radio Service station KM2XGS (St. Louis, MO) and is currently preparing to commence a series of experiments designed to advance the state of the PCS art.³ Gateway's goal, simply put, is to become a PCS licensee.

Gateway applauds the Commission's decision to take the lead in promoting PCS, even though PCS is still in its embryonic stages. The *Notice* is certainly correct in concluding that "[p]ersonal communications requirements in the United States are rapidly changing as our society becomes more mobile and the demand for instantaneous communications increases."⁴ The Commission's efforts in this proceeding (particularly the early release of the *Policy Statement and Order*⁵) have provided those interested in pursuing PCS development a framework that has been sufficiently structured as to provide necessary guidance, without stifling creativity. The fact that the Commission has received requests for and has granted over 150 licenses in the Experimental Radio

³See "Experimental Applications Granted During the Fourth Quarter of FY92", Report No. 260 (rel. Oct. 20, 1992). Briefly, Gateway's experimental program is designed to determine the optimum modulation scheme for PCS and to address the thorny issues raised by the sharing of the 2 GHz band with incumbent point-to-point microwave systems. A more detailed description of Gateway's experimental program can be found in its application file.

⁴*Notice*, *supra* note 10, 7 FCC Rcd at 5687.

⁵*Amendment of the Commission's Rules to Establish New Personal Communications Services*, 6 FCC Rcd 6601 (1991).

Service to over 100 companies for PCS experimentation is proof-positive that the private sector is responsive to the Commission's efforts to develop PCS as an innovative, spectrally efficient set of services.⁶

Gateway is concerned, however, that the Commission's efforts to spur technological advances could be undercut by the licensing mechanism chosen for PCS. Like many other innovative, entrepreneurial firms that are turning their attention to PCS, Gateway has limited financial wherewithal. Simply put, if the Commission decides to employ competitive bidding to award PCS licenses, and Congress authorizes the Commission to do so, small but highly creative firms like Gateway will likely be foreclosed from serving as PCS licensees.⁷ It is no secret that the Commission has

⁶See *Notice*, *supra* note 10, 7 FCC Rcd at 7681.

⁷Appendix E to the *Notice* suggests two alternative payment plans apparently designed to promote participation by smaller firms. See *Notice*, *supra* note 1, 7 FCC Rcd at 5768. Yet, on analysis, neither approach is particularly satisfying. First, the Commission proposes that the Commission permit payments over a three year period. See *id.* Presumably, the reasoning behind such an approach is that smaller bidders could anticipate the use of system revenues to make payments once the system is operating. In reality, however, the larger bidders will still be able to tender higher bids, since they will be able to bring their existing wealth to bear. Their bids will inevitably rely not only on anticipated revenues from the first three years of system operations, but will use their existing resources to bid higher in anticipation of profits beyond the first three years of operations.

Second, Appendix E suggests that the Commission accept an up-front payment and royalties at a fixed rate. While in theory such a system creates a somewhat more level playing field between large and small bidders, in practice the results will likely be otherwise. Once again, however, larger companies would have an advantage. Those with greater wealth could tender bids with higher initial payments. Were the Commission to permit bidders to propose different royalty rates, the larger firms would

(continued...)

seriously considered a licensing system that would preclude all but the nation's largest companies for securing PCS authorizations⁸; indeed, the issuance of nationwide licenses through auctions is one of the alternative approaches advanced in the *Notice*. Yet, as Commissioner James H. Quello rightly noted in his separate statement accompanying the *Notice*, those with the deepest pockets do not always have the most innovative ideas where technology is concerned.⁹ Particularly with a nascent service like PCS, it is essential that the Commission not foreclose technological innovation.

The Commission has not lost sight of the importance of promoting technological advancement. Indeed, the Commission has promulgated Section 1.402 of its Rules and established a pioneer's preference program in the belief that:

a pioneer's preference has merit and could foster a host of valuable new technologies and services for the public. The present method of assigning licenses . . . appears to have dissuaded in the past at least some potential pioneers from seeking the authorization of new communications services. Of greater concern is the possibility that as future pathbreaking new telecommunications technologies and services are introduced worldwide, American consumers may not have the early benefit of these technologies and

⁷(...continued)

be less adverse to proposing higher royalty rates, since they could subsidize mistakes from the revenues of other ventures. Moreover, as the Commission forthrightly recognizes in Appendix E, where "royalties are based on the output or revenues of the winning firm, they will act as a tax on incremental production and therefore tend to reduce output." *Id.*

⁸*See e.g.* Andrews, "FCC Devising Plan to License Future Phones", *N.Y. Times*, at § A, p. 1 (July 10, 1992).

⁹*Notice, supra* note 1, 7 FCC Rcd at 5774.

services, owing to the belief of innovators that the regulatory burden is excessive in the United States. We are persuaded that a significant reward should be given to induce innovators to present their proposals to the Commission in a timely manner.¹⁰

Yet, as the Separate Statement of Commissioner Andrew C. Barrett and the Concurring Statement of Commissioner Ervin S. Duggan to the *Tentative Decision and Memorandum Opinion and Order* (the "*Tentative Preference Order*") awarding just three PCS pioneer's preferences evidence, the flaws in the Commission's pioneer preference system are becoming apparent.¹¹ Rather clearly, the reward associated with a pioneer's preference -- a guaranteed authorization -- is so great that the Commission feels compelled to award pioneer's preferences in a niggardly fashion. As a result, the Commission is, as Commissioner Duggan feared when the pioneer's preference rules were first adopted, engaging in "hair-splitting debates about what constitutes real newness, novelty and pioneering."¹²

Based on the experience to date under Section 1.402 of the Commission's Rules, it is inevitable that the pioneer's preference system will fail to fully achieve its intended goals. The *Notice* finds that:

¹⁰*Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services*, 6 FCC Rcd 3488, 3490 (1991)[hereinafter cited as "*Pioneer's Preference Order*"].

¹¹*See Amendment of the Commission's Rules to Establish New Personal Communications Services*, FCC 92-467 (rel. Nov. 6, 1992)[hereinafter cited as "*Tentative Preference Order*"].

¹²*Pioneer's Preference Order*, *supra* note 10, 6 FCC Rcd at 3500.

the pioneer's preference rules have sparked a substantial interest on the part of a wide variety of parties, and . . . a considerable number [of PCS experimenters] have conducted substantial experimentation and collectively accomplished significant innovation that relates to PCS. We believe that such results will lead to implementation of significant new services and technologies that will enhance U.S. productivity and competitiveness.¹³

That is certainly true. However, the *Tentative Preference Order* has rejected pioneer's preference applications from many of those who conducted this "substantial experimentation" and "accomplish significant innovation". As a result, whether the substantial PCS experimental efforts of the past year would ever be repeated in the future for PCS or any other emerging service is questionable. Because the *Tentative Preference Order* and the recent pioneer's preference decisions in other services¹⁴ now evidence that pioneer's preferences will rarely be awarded, that the level of pioneering required to secure a preference is so great, and that it is virtually impossible to predict beforehand whether a developmental effort will yield a preference, the prospect of securing a preference will prove scant incentive to innovate in the future.

Gateway believes that the Commission can enhance the prospects for achieving the goals of the pioneer's preference program by awarding, if you will, a

¹³Notice, *supra* note 10, 7 FCC Rcd at 5733.

¹⁴See Amendment of Section 2.106 of the Commission's Rules to Allocate the 1610-1626.5 MHz and the 2483.5-2500 MHz Bands for Use by the Mobile-Satellite Service, Including Non-geostationary Satellites, ET Docket No. 92-28, FCC 92-358 (rel. Sept. 4, 1992)(tentatively denying all requests for mobile-satellite service pioneer's preferences).

consolation prize to entities whose developmental efforts are meaningful, but fall short of meriting the award of a guaranteed license. Specifically, Gateway proposes that a 2:1 PCS lottery "experimenter's preference" be afforded to any applicant that has conducted experiments in the Experimental Radio Service and has submitted a meaningful experiment report that both provides the Commission with greater insight into how PCS will operate and contributes towards the promulgation of final PCS rules.¹⁵ Adoption of this approach, which is based on a suggestion by Commissioner Duggan in his concurring statement to the PCS pioneer's preference tentative decision,¹⁶ would provide additional incentive, particularly for smaller companies, to develop innovative approaches to the many issues facing the PCS.¹⁷

¹⁵Gateway does not believe that eligibility for the "experimenter's preference" should be limited to those who have conducted experiments regarding the technologies that are ultimately adopted for PCS. For example, one who tests a potentially innovative new technology, but ultimately determines that it is unsuitable for PCS usage and provides a report to that effect to the Commission, has performed a useful public service and should be rewarded with an "experimenter's preference."

¹⁶*See Tentative Preference Order, supra* note 11, Concurring Statement of Commissioner Ervin S. Duggan, at 2.

¹⁷It is important that the rules governing the processing of a request for an "experimenter's preference" not unduly delay the licensing of PCS systems. To avoid such a delay, Gateway suggests that the Commission require the submission of applications for an "experimenter's preference" within fifteen days of the publication of the final PCS rules in the *Federal Register*, that only fifteen days be afforded after the release of a public notice announcing the acceptance of an application for an "experimenter's preference" to submit oppositions, that reply comments be due ten days thereafter, and that those who are found to submit a frivolous application or opposition be barred from holding a PCS authorization.

In short, although the Commission should be applauded for its actions to bring PCS to market, the proposal advanced in the *Notice* to employ auctions is flawed. Rather than seek authority from Congress to utilize auctions -- a selection vehicle that will invariably foreclose smaller entities from serving as PCS licensees -- the Commission should instead adopt a reformed lottery system that will reduce speculative applications and provide an additional incentive for small, innovative companies like Gateway to expand their PCS development efforts.

Respectfully submitted,

GATEWAY TECHNOLOGY, INC.

By: 

Paul J. Sinderbrand
Dawn G. Alexander

Keck, Mahin & Cate
1201 New York Avenue, N.W.
Penthouse
Washington, D.C. 20005-3919
(202) 789-3400

Its Attorneys

November 9, 1992